Washington Law Review

Volume 67 | Number 4

10-1-1992

Deterring Egregious Violations of Public Policy: A Proposed Amendment to the Model Employment Termination Act

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DETERRING EGREGIOUS VIOLATIONS OF PUBLIC POLICY: A PROPOSED AMENDMENT TO THE MODEL EMPLOYMENT TERMINATION ACT

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Abstract: The Model Employment Termination Act (Model Act), if enacted by state legislatures, would provide good cause protection to private sector employees. In exchange for this increased job security, the Model Act limits the range of remedies available for wrongful discharges. This Comment compares the remedies available under common law to those embodied in the Model Act and concludes that the Model Act does not adequately deter abusive discharges in violation of public policy. By amending the Model Act to include a capped punitive damages provision for egregious violations of public policy, state legislatures can achieve deterrence without undermining the compromise philosophy of the Model Act.

The doctrine of termination-at-will has pervaded the American employment relationship since the 1870s.[1] The doctrine permits a private sector employer to discharge an employee "for good cause, for no cause or even for cause morally wrong" without incurring liability.[2] Despite widespread scholarly criticism of the doctrine's inequities,[3] courts and legislatures have been reluctant to completely abolish the long-standing at-will presumption.[4] Instead, there has been a gradual, state-by-state erosion of the doctrine of termination-at-will.[5] This piecemeal approach has resulted in widely varied state protections and remedies for wrongfully discharged employees. For example, if an employee is fired for filing a workers' compensation claim in Georgia, there may be no basis for recovery.[6] By contrast, if that same

1. This conceptualization of the employment relationship as terminable at-will is often attributed to Horace Wood. His inclusion of this principle in his 1877 treatise led to its widespread adoption in the United States. Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis, reprinted in* WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES 27–31 (1985).

2. Payne v. Western & Atl. R.R., 81 Tenn. 507, 519–20 (1884), *overruled on other grounds,* Hutton v. Watters, 179 S.W. 134 (Tenn. 1915).

3. *See, e.g.,* Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1404 (1967); Cornelius J. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law,* 40 OHIO ST. L.J. 1 (1979); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 VA. L. REV. 481 (1976).

4. In 1987, Montana became the first and only state to legislatively prohibit wrongful discharges. *See* MONT. CODE ANN. § 39-2-901 to -914 (1991).

5. *See infra* note 14 and accompanying text.

6. Evans v. Bibb Co., 342 S.E.2d 484 (Ga. Ct. App. 1986).

employee is terminated in Illinois, where that state's supreme court recognizes a common law cause of action for discharges in retaliation for filing a workers' compensation claim, then the employee would be entitled to the full range of tort remedies.[7] In Maine, the remedies for the same discharge are prescribed by statute and include the equitable relief of reinstatement and back pay plus reasonable attorney fees.[8]

This nonuniformity provided an impetus for development of the Model Employment Termination Act[9] (Model Act) by the National Conference of Commissioners on Uniform State Laws. The Model Act attempts to balance employee interests in increased job security against employer concerns about large recoveries in wrongful discharge cases. If enacted by the states, the Model Act would legislatively eliminate the at-will presumption and would require that terminations be imposed only for good cause.[10] This statutory embodiment of a good cause requirement represents a radical departure from current law. Consequently, it is touted by some as one of the most important recent developments in employment law.[11] In exchange for enhanced job security, the Model Act attempts to allay employers' concerns about large recoveries by limiting the range of available remedies to reinstatement, back pay, attorney fees, and a severance payment when reinstatement is infeasible. By focusing on the balance between employers' and employees' interests when formulating this compromise, the drafters of the Model Act failed to adequately protect important societal interests. Most state courts have recognized a tort cause of action when employer discharges threaten to undermine public policy. By contrast, the Model Act provides no mechanism for deterring employer conduct that constitutes an egregious violation of public policy. Inclusion of a capped punitive damages provision will remedy this deficiency by establishing a mechanism for deterrence without subjecting employers to unlimited liability. This amendment would create the appropriate balance between employer, employee, and societal interests.

7. Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978).

8. ME. REV. STAT. ANN. tit. 39, § 111 (West 1964 & Supp. 1991).

9. MODEL EMPLOYMENT TERMINATION ACT, *reprinted in* 540 Individual Empl. Rights Man. (BNA) 21 (1991) [hereinafter MODEL ACT]. The commissioners stressed the need for uniformity, "because employees might be hired in one state, work in another, and be fired in a third . . . ." *Id.* prefatory note, at 21.

10. *Id.* § 3.

11. Randall Samborn, *At-Will Doctrine Under Fire,* NAT'L L.J., Oct. 14, 1991, at 1.

I. COMMON LAW CAUSES OF ACTION AND REMEDIES FOR WRONGFULLY DISCHARGED EMPLOYEES

A. Common Law Causes of Action

State courts began modifying the steadfast principle of termination-at-will spurred, in part, by the legal shift towards the protection of individual employee rights[12] and by the "changing legal, social and economic conditions" in America.[13] Three prevalent exceptions to the doctrine of termination-at-will have emerged. These exceptions include: 1) violations of public policy; 2) breaches of express or implied contracts; and 3) breaches of the implied covenant of good faith and fair dealing. Although some states recognize all three exceptions, most have only adopted one or two.[14]

1. The Public Policy Exception

A majority of state courts recognize that an employee has a tort cause of action against an employer when the termination contravenes principles of public policy.[15] Although an employee's interest in job security is furthered by the public policy exception, this result is only incidental.[16] The underlying purpose of this tort exception is to prevent abusive discharges that undermine important public policies. In general, public policy violations can be divided into three broad categories. First, courts have held that forcing an employee to choose between continued employment and performing an unlawful act

12. HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE 12–14 (1984). Perritt asserts that the shift towards protecting the individual rights of employees is evidenced by the passage of acts prohibiting discrimination such as Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1981 & Supp. 1992). Perritt argues that as judges became more familiar with the protections afforded by discrimination statutes, they also became less comfortable with the rigidity of the termination-at-will rule. *Id.* at 12–13.

13. Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974).

14. Forty-two jurisdictions recognize the public policy exception, 34 have adopted a contract exception, and 12 recognize the covenant of good faith and fair dealing. Employment At Will: State Rulings Chart, 505 Individual Empl. Rights Man. (BNA) 51 (1992) [hereinafter State Rulings Chart]. For a review of state court decisions adopting and interpreting the scope of these exceptions, see IRA MICHAEL SHEPARD ET AL., WITHOUT JUST CAUSE: AN EMPLOYER'S PRACTICAL AND LEGAL GUIDE ON WRONGFUL DISCHARGE A-3 to A-127 (1989).

15. Identifying public policy has proven problematic, however. Some states accept statutes, court decisions, regulations, and professional codes of ethics as sources of public policy. Other states construe this exception more narrowly and only find expressions of public policy contained in statutes to be sufficient. JOHN C. MCCARTHY, PUNITIVE DAMAGES IN WRONGFUL DISCHARGE CASES § 1.2 (1985 & Supp. 1988).

16. Jane P. Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449, 459 (1985).

undermines societal interests in lawful conduct.[17] For example, employment contingent upon giving perjured testimony would not only encourage criminal conduct on the part of the employer and employee, but could also hamper the administration of justice.[18] By recognizing a public policy exception to the doctrine of termination-at-will, courts provide employees with a stronger incentive to obey the law despite the risk of termination.[19] Second, discharging employees for exercising a legitimate right or privilege based on statutory[20] or constitutional law[21] circumvents public policy interests. By threatening termination, an employer could prevent an employee from exercising any rights less valuable than continued employment.[22] Third, terminations in retaliation for the performance of civic duties are considered violations of public policy, even when those duties are not mandated by law.[23] For instance, many state courts have extended tort protections to whistleblowing employees by recognizing that their reports serve important societal interests.[24]

2. *Express or Implied Contract Exception*

Employers can bind themselves to a just cause standard for dismissal through express or implied agreements absent any additional consideration.[25] Express contracts are created when the duration of the contract is specified and when the contract prohibits terminations without cause.[26] Implied contracts may be established by oral assur-

17. *E.g.*, Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1336–37 (Cal. 1980) (discharged for refusing to participate in an illegal price-fixing scheme).

18. Petermann v. Local 396, Int'l Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Ct. App. 1959).

19. Mallor, *supra* note 16, at 463.

20. *E.g.*, Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979) (discharged for refusing to submit to a polygraph exam); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978) (terminated in retaliation for filing a workers' compensation claim).

21. Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (holding that a discharge for refusing to participate in company's lobbying effort contravened constitutional right of free expression).

22. HOLLOWAY & LEECH, *supra* note 1, at 272–73.

23. *E.g.*, Nees v. Hocks, 536 P.2d 512 (Or. 1975) (discharged for performing jury duty); Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981) (terminated for supplying information to law enforcement officials regarding possible criminal violations by a fellow employee).

24. Twenty-two jurisdictions interpret the public policy doctrine to protect whistleblowers. James N. Adler & Mark Daniels, *Managing the Whistleblowing Employee,* 8 THE LAB. LAW. 19, 31 n.39 (1992); *e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980) (discharged for trying to ensure that employer's products would comply with labeling and licensing laws); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) (terminated for attempting to persuade employer to comply with consumer protection laws).

25. Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 925 (1981).

26. 505 Individual Empl. Rights Man. (BNA) 2 (1991).

ances or statements in company policy manuals. For example, an oral promise that employment will continue as long as the employee is "doing the job" could create a contract terminable only for cause.[27] Additionally, employment manuals, or other statements of company policy prescribing the procedures for disciplinary actions may give rise to legitimate expectations that just cause will be required before discharge.[28] In an effort to avoid liability for breach of contract, employers may include disclaimers in employment applications and company policy manuals.[29] These practices could lessen the protective effects of this exception.

3. The Implied Covenant of Good Faith and Fair Dealing Exception

Only a small number of jurisdictions recognize the implied covenant of good faith and fair dealing.[30] This exception relies on the notion that the concept of good faith underlies every contract, including employment contracts,[31] and requires that neither party do anything that deprives the other of the right to receive the benefits of the contract.[32] Courts have employed this exception to find a breach when the employee has been "unfairly injured, even when no breach of the express terms of the contract occurred."[33] For instance, this exception has been used to limit employers' power to terminate employees with long histories of employment in the same company.[34] Other courts have applied the covenant to employers who terminate in an effort to avoid compensating their employees.[35]

B. Common Law Remedies for Wrongfully Terminated Employees

Under common law, the type of damages available to a wrongfully discharged employee is contingent upon the theory of recovery under which relief is granted. For instance, if the discharge falls within the

27. Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 884 (Mich. 1980).

28. Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 228–30, 685 P.2d 1081, 1087–88 (1984).

29. *E.g.*, Reid v. Sears, Roebuck & Co., 790 F.2d 453 (6th Cir. 1986); *Thompson*, 102 Wash. 2d at 230–31, 685 P.2d at 1088.

30. State Rulings Chart, *supra* note 14, at 51–52.

31. HOLLOWAY & LEECH, *supra* note 1, at 62.

32. Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722, 728 (1980).

33. MCCARTHY, *supra* note 15, § 2.1, at 81.

34. *E.g.*, *Cleary*, 168 Cal. Rptr. at 729 (longevity of service combined with expressed policy of employer precluded discharge).

35. *E.g.*, Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) (fired an employee of 25 years to avoid paying a large sales commission).

implied contract exception, then contract damages[36] are available. Likewise, damages for a breach of the covenant of good faith and fair dealing may often be limited to contract damages.[37] The public policy exception, by contrast, is generally founded upon tort principles;[38] therefore, a broader array of remedies is available. In addition to traditional contract damages, a wrongfully discharged employee can recover noneconomic and punitive damages when the termination constitutes a tort.

1. Contract Remedies

Contract law favors the award of monetary damages as the means of giving the employee the benefit of the breached employment contract. Although equitable relief in the form of reinstatement is often the preferred remedy in anti-discrimination statutes,[39] courts have long adhered to the rule that personal service contracts may not be specifically enforced.[40] As a result, a prevailing employee is usually limited to back pay, lost benefits, and, when reasonably foreseeable, front pay and consequential damages.[41] Back pay includes all earnings and benefits lost as a result of the termination until the employee becomes reemployed, is reinstated, or abandons the job search.[42] Some courts allow back pay to accrue up until the time of judgment, however, an employee has a continuing duty to mitigate back pay damages.[43] Difficulties arise in determining the appropriate award when an employee has been unable to find new employment before trial or the new job

36. Usually, the plaintiff is entitled to receive the "benefit of the bargain" had the contract been fully performed. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.1 (1973).

37. There is a split of authority among courts as to whether bad faith terminations should result in contract or tort remedies. *Compare* K Mart Corp. v. Ponsock, 732 P.2d 1364 (Nev. 1987) (recognizing tort of bad faith discharge) *with* Foley v. Interactive Data Corp., 765 P.2d 373, 396, 401 (Cal. 1988) (limiting damages for breach of the implied covenant to contract remedies) *and* Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989) (limiting damages for breach of the implied covenant of good faith and fair dealing to contract damages).

38. Alaska, Arkansas, and South Dakota, however, characterize the public policy exception as a contract action. 1 LEX K. LARSON & PHILIP BOROWSKY, UNJUST DISMISSAL § 9A.01 n.18 (1990).

39. *E.g.*, National Labor Relations Act, 29 U.S.C.A. § 160(c) (West 1973 & Supp. 1992); Age Discrimination in Employment Act of 1967, 29 U.S.C.A. § 626(b) (West 1985); Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-5(g) (West 1981 & Supp. 1992).

40. Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 10 (1988). *But see* Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 841 (Wis. 1983) (stating that reinstatement and back pay are the most appropriate remedies for wrongful discharge).

41. LARSON & BOROWSKY, *supra* note 38, § 9A.02. Consequential damages may include the expenses associated with searching for another position. *Id.* § 9A.02[7].

42. SHEPARD, *supra* note 14, at 199.

43. LARSON & BOROWSKY, *supra* note 38, § 9A.02[4] nn.1–2.

provides less compensation. In those instances, future damages may be the proper measure.[44] Front pay awards compensate a discharged employee until that time when the employee could reasonably be expected to find reemployment in a comparable position.[45] For an older employee with little prospect of being reemployed in a comparable position, a front pay award may be quite large.[46]

2. *Tort Remedies*

Tort remedies generally include the same economic damages available under a contract action, even though tort damages are based on proximate cause rather than foreseeability.[47] The predominant difference between tort and contract damages is the availability of noneconomic and punitive damages[48] in tort actions. Noneconomic damages compensate an employee for intangible losses such as emotional distress[49] and damage to reputation.[50] Of the rationales frequently put forth for the imposition of punitive damages,[51] wrongful discharge cases often emphasize the need to deter egregious violations of public policy.[52] Additionally, without the possibility of punitive

44. A few jurisdictions prohibit the award of future damages for breach of the employment contract. *Id.* § 9A.02[5] nn.14–15.

45. SHEPARD, *supra* note 14, at 200.

46. *See, e.g.*, Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275 (S.D. 1983) (front pay for 51-year-old wrongfully terminated employee determined by calculating pre- and post-termination earning capacity multiplied by work-life expectancy).

47. Contract damages are limited to those reasonably foreseeable at the time the contract was made. By contrast, tort damages do not depend upon the parties' expectations at the time of contract. Tort recovery extends to losses proximately caused by the termination. LARSON & BOROWSKY, *supra* note 38, § 9A.03[1].

48. Four states do not permit awards of punitive damages at common law: Louisiana, Nebraska, Massachusetts, and Washington. Mallor, *supra* note 16, at 449 n.1. Those states only permit punitive damages when expressly authorized by statute. 2 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES §§ 18.1(A)(18), (21), (27), (47) (1989).

49. Unlike the common law tort of intentional infliction of emotional distress, a damage award for emotional distress does not require proof of employer intent to cause distress nor does it necessitate a showing of outrageous behavior. Cagle v. Burns & Roe, Inc., 106 Wash. 2d 911, 726 P.2d 434 (1986); LARSON & BOROWSKY, *supra* note 38, § 9A.03[2][c].

50. *See, e.g.*, Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378 (6th Cir. 1983).

51. There are seven objectives for awarding punitive damages:

> 1) punishment of the defendant; 2) specific deterrence, to prevent the defendant from repeating the offense; 3) general deterrence, to prevent others from committing similar offenses; 4) preservation of the peace; 5) inducement for private law enforcement; 6) compensation to victims for otherwise uncompensable losses; and 7) payment of the plaintiff's attorneys' fees.

MARK PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS 2 (1987).

52. *E.g.*, Kelsay v. Motorola, Inc., 384 N.E.2d 353, 359 (Ill. 1978) ("In the absence of the deterrent effect of punitive damages there would be little to dissuade an employer from engaging in the practice of discharging an employee for filing a workmen's compensation claim." The court reasoned that the compensatory damages alone, which in *Kelsay* only amounted to $749,

damages, many lower-paid employees would be unable to retain an attorney.[53] The potential for higher awards associated with punitive damages also encourages the bringing of meritorious litigation and compensates employees for injuries not otherwise recoverable.[54]

II. A LEGISLATIVE SOLUTION TO WRONGFUL DISCHARGE: THE MODEL EMPLOYMENT TERMINATION ACT

In August of 1991, after nearly four years of drafting, the National Conference of Commissioners on Uniform State Laws adopted the Model Act. If enacted by state legislatures, the Model Act would alleviate the uncertainty surrounding the status of wrongful discharge litigation by mandating a uniform good cause standard. Consequently, a terminated employee would no longer be denied relief just because the discharge did not fall within one of the state's judicially recognized exceptions. Additionally, the Model Act's preference for arbitration attempts to increase access to recovery for low-ranking employees traditionally denied relief because of the prohibitive costs of litigation.[55] In exchange for the abolition of termination-at-will and increased access to recovery, the Model Act limits the range of remedies to reinstatement, back pay, attorney fees, and severance pay when reinstatement is infeasible. This limitation of damages is a key component of the Model Act's underlying philosophy of compromise.[56]

A. Scope of Good Cause Coverage

The Model Act prohibits terminations without good cause.[57] The definition of good cause includes both an objective and subjective component. The objective component requires an employer to have a reasonable, job-related justification for terminating an employee.[58] In rendering this determination, an employer must consider the stand-

"would do little to discourage the practice of retaliatory discharge, which mocks the public policy of this state . . . ."); Hansen v. Harrah's, 675 P.2d 394, 397 (Nev. 1984) ("[T]he threat of punitive damages may be the most effective means of deterring conduct which would frustrate the purpose of our workmen's compensation laws.").

53. Under common law, the majority of wrongful discharge plaintiffs are members of management. JAMES N. DERTOUZOS ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATIONS 21 (1988); Mallor, *supra* note 16, at 490.

54. Mallor, *supra* note 16, at 490–91.

55. *See Id.*; DERTOUZOS, *supra* note 53, at 21.

56. MODEL ACT, *supra* note 9, prefatory note, at 24.

57. *Id.* § 3(a).

58. *Id.* § 1(4)(i). Examples of good cause include discharges for theft, fighting on the job, drug or alcohol use or possession on the job, insubordination, incompetence, lack of productivity, and excessive absenteeism. *Id.* § 1 cmts.

ards of performance required by the position in relation to the employee's job performance, conduct, and employment record.[59] An employer may also use its subjective, good faith business judgment to determine economic goals for the company and the methods for implementing those objectives.[60] Terminations resulting from honest business decisions are for good cause.[61]

Good cause protections extend to nonprobationary employees who work, on average, more than twenty hours per week.[62] The Act excludes independent contractors, those with contracts of a specified duration, and employers with fewer than five employees.[63] Covered employees may waive their rights to the Act's protections by express written agreements. This opt-out provision permits return to employment-at-will so long as the employee receives a minimum schedule of graduated severance payments.[64] Similarly, those not within the scope of the Act may opt-in by express written agreements.[65]

B. Procedures for Dispute Resolution

The Model Act prefers arbitration rather than litigation as the forum for dispute resolution. This preference for arbitration acknowledges that professional arbitrators possess greater expertise with regard to work-place disputes, and therefore are better able to resolve employment difficulties.[66] Additionally, arbitration proceedings are generally less expensive and more expedient than other forums for dispute resolution.[67] Even though arbitration is favored, the Model Act's arbitration scheme differs from labor arbitration in two significant respects. First, unlike labor arbitration where arbitrators are often selected by mutual agreement of the parties,[68] the Model Act places the responsibility for appointing arbitrators on the states.[69] Second, the Model Act places the burden of proof on the complaining

59. *Id.*

60. *Id.* § 1(4)(ii).

61. Examples include down-sizing of the work force, consolidation of positions, or changes in performance standards for certain positions. *Id.*

62. *Id.* § 3(b).

63. *Id.* §§ 1(1)-(2), 2(b), 4(d).

64. The severance payment must be equal to at least one month's pay for each year worked, up to a maximum of 30 months at the employee's rate of pay in effect immediately before the termination. *Id.* § 4(c).

65. *Id.* § 4(f).

66. *Id.* Alternative B cmts.

67. FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 8–10 (3d ed. 1973).

68. *Id.* at 87.

69. MODEL ACT, *supra* note 9, § 6 cmts.

employee[70] in contrast to the labor arbitration model where the employer bears the burden of proof.[71] Although arbitration is preferred, the Model Act provides two other alternatives to the choice of forum: an administrative or judicial proceeding. The administrative option allows states concerned about the governmental expense associated with outside arbitrators the choice of employing full-time civil service personnel to adjudicate disputes, rather than maintaining a system of selecting independent arbitrators.[72] States may also elect to retain judicial proceedings if concerned about the constitutional implications of limiting access to jury trials.[73]

C. *Remedies Available Under the Model Act*

An employee discharged without good cause can only be awarded remedies specifically enumerated in the Model Act. Reinstatement, although almost never an option under common law, is the preferred remedy under the Model Act.[74] Reinstatement may be awarded in conjunction with a full or partial award of back pay.[75] Because arbitration proceedings are generally more expedient,[76] the amount of back pay, measured from the date of termination until the time of reinstatement or an award, will likely be smaller than under common law. Several years may pass under the common law before a wrongful discharge case comes to trial,[77] during which time back pay damages continue to accrue if mitigation efforts have been unsuccessful.

An employee may recover a lump sum severance payment when reinstatement is not a feasible alternative because of personal relations between the parties or changes in the employer's business.[78] As with an award of front pay under common law, the severance payment is

70. *Id.* § 6(e). Placing the burden of proof on the employees has been criticized, because it requires employees to prove the negative. Employers should bear the burden of proof because they have the greatest access to information regarding the reasons for termination. Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge,* 66 WASH. L. REV. 719, 768 (1991).

71. ELKOURI & ELKOURI, *supra* note 67, at 621.

72. MODEL ACT, *supra* note 9, Alternative B cmts.

73. *Id.*

74. *Id.* § 7(b)(3) cmts.

75. Arbitrators may award "full or partial backpay and reimbursement for lost fringe benefits, with interest, reduced by interim earnings from employment elsewhere, benefits received, and amounts that could have been received with reasonable diligence." *Id.* § 7(b)(2).

76. *See id.* § 6(c) cmts.

77. A study by the Rand Institute found that, of 120 wrongful discharge cases sampled in California, the average length of time for the case to reach trial was 38 months. DERTOUZOS, *supra* note 53, at 24–25.

78. MODEL ACT, *supra* note 9, § 7(b)(3) cmts.

calculated from the date of the award, however, the Model Act imposes a three year cap.[79] In addition to an award of reinstatement, back pay, or severance pay, the fact-finder may also award reasonable attorney fees and costs.[80]

The Model Act specifically excludes compensatory and punitive damages as well as damages for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law.[81] The exclusion of punitive damages represents a significant departure from earlier versions of the Act that permitted punitive damage awards for three types of violations.[82] First, earlier versions permitted a double back pay award if the termination was a willful violation of the Model Act and lacking in good faith.[83] Second, the arbitrator had broad discretion to award punitive damages if the termination constituted a malicious violation of public policy protections enumerated in the Act.[84] Third, punitive damages were available to employees retaliated against for participating in proceedings under the Model Act.[85] The final version of the Model Act, however, prohibits punitive damages, except when an employer retaliates against an employee lawfully participating in proceedings under the Model Act.[86]

III. ANALYZING THE REMEDIAL SCHEME OF THE MODEL EMPLOYMENT TERMINATION ACT

Nationwide adoption of the Model Act would ensure good cause protection for all employees while at the same time limiting the potential liability of employers. The remedial provisions of the Model Act, however, are insufficient for two related reasons. First, the Model Act does not permit punitive damages for egregious violations of public policy. Without an explicit punitive damages remedy, public policy violations may continue unabated. Therefore, states adopting the Model Act should amend it to include a punitive damages provision.

79. The lump sum severance pay is based on the employee's rate of pay prior to termination and should not exceed 36 months. Lost fringe benefits may also be included in the award. Like back pay, the severance payment must be mitigated by earnings and benefits. *Id.* § 7(b)(3).

80. *Id.* §§ 7(b)(4), 7(e)–(f).

81. *Id.* § 7(d).

82. Draft Uniform Employment Termination Act, 540 Individual Empl. Rights Man. (BNA) 71, § 7 (February 23, 1990) [hereinafter 1990 Draft].

83. *Id.* § 7(b)(3).

84. *Id.* § 7(b)(8). Public policy protections were extended to two classes of employees: 1) those discharged in violation of a public policy derived from statutory or constitutional law, and 2) good faith whistleblowers. *Id.* § 2(d).

85. *Id.* § 10.

86. MODEL ACT, *supra* note 9, § 10.

Second, the Model Act permits employers to exclude employees from the Model Act's coverage by using waiver agreements. Waiver agreements circumvent the general remedies contained within the Act. In order to ensure effective deterrence through a punitive damages provision, waiver agreements should be restricted to a small percentage of key personnel.

A. The Model Act's Remedies Do Not Adequately Deter Egregious Employer Misconduct

The Model Act contains no provisions to deter egregious violations of public policy. This serious shortcoming resulted from the remedial compromise that eliminated the tort damages available under common law for public policy violations. Neither reinstatement nor a capped severance payment award is an adequate substitute for a specific deterrent mechanism.

1. A Uniform Mechanism to Deter Egregious Misconduct is Necessary

The common law public policy exception is premised on the protection of important societal interests such as promoting lawfulness, protecting legal rights, and encouraging the performance of civic duties. Courts recognize that employers can use the threat of termination to coerce employees to commit illegal acts, abrogate employees' rights, and prevent employees from performing civic duties.[87] For instance, employees who are aware that filing a workers' compensation claim will result in subsequent termination are likely to forego statutorily guaranteed compensation in order to retain their jobs.[88] Thus, employers can effectively circumvent the entire workers' compensation scheme by restraining employees from filing claims.[89] To prevent such circumvention, state courts created a cause of action entitling employees to the full panoply of tort remedies for retaliatory discharges.

The Model Act, however, eliminates the potential for tort damages without establishing a systematic method for deterring the most egregious violations of public policy. Instead, the Model Act delegates to the states the responsibility for creating a remedial scheme for violations of public policy and termination of whistleblowers. Comments in the Act provide that, "[B]y statutory enactment any state may provide separate, independent remedies for certain classes of terminated

87. *See supra* notes 15–24 and accompanying text.
88. Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978).
89. *Id.*

employees—for example, whistleblowers and the victims of egregious violations of public policy—which are broader and more extensive than those prescribed by this Act."[90] This comment implicitly recognizes that some violations could be so egregious as to warrant remedies greater than those explicitly set forth in the Model Act.

Failure to prescribe the appropriate remedies for egregious terminations will result in an ad hoc, nonuniform response by state legislatures. State responses could range from no action to codification of the state's recognized public policy protections, thereby, creating even greater variability under the Model Act. In addition, statutory protections for whistleblowers currently differ substantially from state to state.[91] Consequently, the Model Act's failure to prescribe the appropriate remedy for whistleblowing will perpetuate nonuniformity in whistleblower protections while eliminating safeguards in states that currently recognize a tort cause of action.

2. *Reinstatement is an Inadequate Deterrent*

Reinstatement cannot effectively deter egregious violations of public policy for two reasons. First, although the Model Act prefers reinstatement, it is unlikely to be awarded in many circumstances. Second, even when reinstatement is awarded, the deterrent effect will be minimal because an employer is unlikely to be financially impacted by such a remedy.

The Model Act does not mandate reinstatement if relations between the parties or changes in the employer's business render it infeasible.[92] Because tension and hostility between the employer and employee often accompany employment discharges, both parties may be reluctant to return to the previous employment relationship. For example, studies of the effectiveness of reinstatement under the National Labor Relations Act (NLRA) found that a large portion of employees terminated for engaging in union activity declined the option to be reinstated.[93] Most who refused reinstatement cited the fear of backlash or retaliation as the predominant reason.[94] In general, employers are also

90. MODEL ACT, *supra* note 9, § 2 cmts.

91. Adler & Daniels, *supra* note 24, at 22–25. Fourteen states statutorily protect whistleblowers against retaliation by private employers: California, Connecticut, Hawaii, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Tennessee, and Wisconsin. *Id.* at 24 n.17.

92. MODEL ACT, *supra* note 9, § 7 cmts.

93. West found that, between 1970 and 1979, 32% of workers declined offers of reinstatement. Two empirical studies based on smaller samples found the rate of rejection of the reinstatement option to be as high as 50% and 59%. West, *supra* note 40, at 28–29.

94. Others declining reinstatement had secured alternate employment. *Id.*

hesitant to reinstate an employee who has been judged undesirable[95] or disloyal. This inherent tension may result in frequent determinations that reinstatement is infeasible.

Reinstatement is unlikely to deter future employer misconduct when awarded, because it is the least costly remedy from the employer's perspective. Unlike a monetary damage award, reinstatement represents a return to the pre-termination conditions. In addition, empirical studies suggest that the duration of reinstatement is relatively short in the absence of a union support mechanism. For example, among employees reinstated under the NLRA, few were still on the job two years later.[96] Most employees had resigned alleging unfair treatment and only a small number were terminated a second time.[97] Although success rates are higher when reinstatement is achieved pursuant to arbitration under a collective bargaining agreement,[98] this success has been attributed to the union's daily presence and control over the process.[99] The combination of these factors instills a greater sense of security in employees.[100] Moreover, in the union setting both parties agree to arbitration; it is not imposed by statute.[101] Even though the Model Act forbids retaliation against employees who participate in proceedings under the Act and permits those employees to sue for damages including punitive damages,[102] the effectiveness of this provision as a replacement for the union structure is uncertain. This uncertainty is magnified by the Model Act's failure to define "retaliation." Employers can subject employees to much unpleasantness that would fall far short of termination or constructive

95. Thomas J. McDermott & Thomas H. Newhams, *Discharge-Reinstatement: What Happens Thereafter*, 24 INDUS. & LAB. REL. REV. 526, 535 (1970–71).

96. West, *supra* note 40, at 29–30. One empirical study conducted from 1962 to 1964 found that 30% of reinstated employees were still employed two years later. Another study conducted from 1971 to 1972 documented that only 11% of those reinstated were still employed after two years. *Id.*

97. *Id.*

98. *Id.* at 38–39. One study found that four years after reinstatement by an arbitrator, 63 out of a total of 111 reinstated employees remained. Arthur M. Ross, *The Arbitration of Discharge Cases: What Happens After Reinstatement, in* CRITICAL ISSUES IN LABOR ARBITRATION 21, 33, 54 (Jean T. McKelvey ed., 1957).

99. West, *supra* note 40, at 39–40. The shorter time period for dispute resolution under arbitration may also be a supporting factor. *Id.* at 39.

100. *Id.* at 39–40.

101. *Id.* at 39.

102. An employer who takes "adverse action in retaliation against an individual for filing a complaint, giving testimony, or otherwise lawfully participating in proceedings under this [Act], . . . is liable to the individual subjected to the adverse action in retaliation for damage caused by the action, punitive damages when appropriate, and reasonable attorney fees." MODEL ACT, *supra* note 9, § 10.

discharge.[103] For instance, an employer can assign unpleasant tasks, increase supervision over the employee, or deny promotions. Proving that these more subtle employer actions constitute retaliation could be difficult without more express prohibitions in the Model Act.

3. *Severance Pay is an Inadequate Deterrent*

When reinstatement is infeasible, the only available remedy is a lump sum severance payment. The Model Act's severance payment formula, however, will not serve as an adequate deterrent mechanism for two reasons. First, the tone of the Model Act discourages high severance pay awards. Although a thirty-six month severance payment is possible,[104] the maximum is unlikely to be awarded except in very rare cases. For example, even when the fact-finder determines that a discharged employee is unlikely to find new employment within the thirty-six month period, the comments warn against awarding the maximum "as a matter of course."[105] Second, principles of mitigation apply to any award, thereby subjecting a severance payment to further deductions.[106] The ability to predict that monetary awards will be relatively low in most instances seriously diminishes the deterrent value of the severance payment contained in the Model Act.

Although the severance payment provision allows the fact-finder to take into account equitable considerations such as the reasons for termination,[107] allowing higher awards for egregious violations would be inconsistent with the Model Act's ban on punitive damages. The comments explicitly provide that the "concept of proportionality"[108] be used when calculating a severance pay award. This principle limits the employer's liability to the amount of the employee's likely loss for which the employer is responsible.[109] Even though the Model Act permits consideration of the reasons for termination, it cannot result in an award in excess of the employee's predicted loss, because punitive damages are banned.[110] Rather than increasing an employee's recovery, this provision will more likely be interpreted as reducing the employer's responsibility for an employee's loss when the employer's

103. Constructive discharge occurs when an employee has quit or retired because conditions are so intolerable that a reasonable individual would quit or retire. *Id.* § 1(8)(iii).

104. *See supra* note 79 and accompanying text.

105. MODEL ACT, *supra* note 9, § 7(b)(3) cmts.

106. *Id.* § 7(b)(3); *see also* SHEPARD ET AL., *supra* note 14, at 205-08.

107. MODEL ACT, *supra* note 9, § 7(b)(3).

108. *Id.* § 7(b)(3) cmts.

109. *Id.*

110. *Id.* § 7(d). Punitive damages are only permitted when an employee is retaliated against for participating in proceedings under the Model Act. *Id.* § 10.

actions constitute a less flagrant violation of the good cause standard. For example, if an employer dismisses an employee for undesirable behavior that falls just short of the good cause threshold, the fact-finder might conclude that the employee was partially responsible for the losses, thereby reducing the severance pay award. Because of the prohibition on punitive damages, severance pay awards cannot be increased for egregiousness, but may be decreased for lack of egregiousness. As a result, the severance pay award cannot effectively deter egregious violations of public policy.

B. Waiver Agreements Preclude Effective Deterrence

The availability of waiver agreements will allow employers to circumvent important public policies. For example, if an employee signs a waiver agreement, an employer who fires that employee for refusing to commit an illegal act will not face any greater consequences than an employer who terminates an employee due to personality conflicts. An employee excluded from good cause protections by a waiver agreement is only entitled to one month's pay for each year worked regardless of the reasons for termination.[111] Employer liability is, therefore, completely predictable. This lack of deterrence is especially problematic, because not only are management-level employees the most likely to be opted-out of the Act's good cause coverage,[112] they are also the most likely personnel to be fired for reasons that violate public policies.[113] For instance, employers will most often direct pressure at management-level employees to commit illegal acts such as falsifying records, fixing prices, or violating professional codes of ethics.[114] Low-ranking employees will rarely be in positions that require them to perform illegal acts or face termination. Additionally, whistleblowers are more frequently high-ranking employees who are privy to more information about company practices.[115]

Although comments in the Model Act indicate that waiver agreements are not intended to create "contracts of adhesion,"[116] most employees will not be in a position to resist waiver agreements. Only unusually qualified employees have power to bargain for job secur-

111. *Id.* § 4(c).

112. *Id.* § 4(c) cmts.

113. Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception,* 96 HARV. L. REV. 1931, 1945–46 (1983); Blades, *supra* note 3, at 1408.

114. Note, *supra* note 113, at 1945–46; *accord* Blades, *supra* note 3, at 1408–09.

115. Note, *supra* note 113, at 1946.

116. MODEL ACT, *supra* note 9, § 4 cmts. The "[d]istinctive feature of adhesion contract[s] is that [the] weaker party has no realistic choice as to its terms." BLACK'S LAW DICTIONARY 40 (6th ed. 1990).

ity.[117] Most management-level employees are replaceable and thus will be subjected to significant pressures to enter into waiver agreements.[118] The inability of most employees to avoid waiver agreements and the small, predictable level of liability associated with waiver agreements precludes deterrence of egregious violations of public policy.

C. Proposal for Amending the Model Act

Inclusion of a punitive damages provision similar to that contained in previous drafts of the Model Act will provide a well-defined deterrent mechanism and uniform enforcement. Until 1990, the Model Act permitted punitive damage awards for malicious violations of public policy, including terminations that violated public policies derived from statutory or constitutional sources, and terminations of good faith whistleblowers.[119] Resurrection of that provision, accompanied by a cap on the amount of punitive damages allowable, will achieve deterrence without undermining employer interests in limited liability. In addition, state legislatures should amend the current waiver provision so that only key personnel can be opted-out of the Act's coverage.

1. A Punitive Damages Provision Would Promote Important Public Policies

An express punitive damages provision would deter egregious misconduct by employers and encourage employees to bring meritorious claims against employers. Older versions of the Model Act permitted punitive damages when the termination violated public policies derived from statutes or constitutions and when the discharge was in retaliation for good faith whistleblowing.[120] Inclusion of a punitive damages provision in the Model Act facilitates deterrence of egregious

117. Blades, *supra* note 3, at 1411–13. Even if an employee is able to bargain for just cause, the terms of the contract will expire at some point, exposing the employee to possible coercion near the date of renewal. *Id.* at 1412.

118. Employers are permitted to fire employees within six months after the effective date of the Act for refusing to enter into a waiver agreement. MODEL ACT, *supra* note 9, § 14. The drafters explicitly state that a waiver agreement can be "impose[d] as a condition of continued employment." *Id.*

119. 1990 Draft, *supra* note 82, § 7(b)(8).

120. *See supra* note 84 and accompanying text. Montana, the only state with a wrongful discharge statute, permits awards for punitive damages when the termination is in retaliation for the "employee's refusal to violate public policy or for reporting a violation of public policy." MONT. CODE ANN. §§ 39-2-904(1), 39-2-905(2) (1991). For a discussion of the events leading up to the adoption of the Montana statute, see LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge From Employment Act: A New Order Begins,* 51 MONT. L. REV. 94, 108 (1990).

conduct in two ways. First, because egregious conduct is defined, employers have advance notice[121] that a discharge would be wrongful and can avoid liability for punitive damages by not terminating. Second, employers who terminate in violation of public policy despite the notice provided by the Act will be liable for greater damages than those employers whose terminations are not egregious. The potential for higher awards in the form of punitive damages increases the uncertainty of liability, thereby increasing deterrence of discharges that undermine societal interests.[122] This added deterrence is especially important when the other remedies are quite small.[123]

The availability of punitive damages would also provide employees with a greater incentive to engage in lawful conduct, pursue legal rights, and report infractions of the law even though such conduct could result in termination. The Model Act's current remedial scheme provides little incentive for employees to engage in such socially desirable conduct and bring meritorious claims. Although the availability of attorney fees may make the costs of bringing a claim less prohibitive, attorney fees do not encourage employees to file claims against employers for egregious terminations. Moreover, the potential for reinstatement or a severance pay award may not provide the requisite incentive, because reinstatement is likely to be unsuccessful[124] and severance payments are likely to be small.[125] The potential for punitive damages could supply the additional monetary incentive employees need to challenge egregious employer misconduct. As more meritorious claims are brought against employers whose terminations violate public policy, deterrence is increased.

121. Permitting punitive damages when statutory or constitutional notice exists is an improvement over the common law approach of refusing punitive damage awards in cases of first impression. As Mallor argues,

> it seems absurd to argue that when a statute forbids the conduct involved, punitive damages should be withheld merely because the employer did not know that it would be subject to civil liability for the discharge. The implication that employers are not aware of statutes but are aware of appellate court decision strains credulity.

Mallor, *supra* note 16, at 483.

122. For example, Congress amended Title VII of the Civil Rights Act of 1964 to include compensatory and punitive damages for intentional discrimination. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The punitive damages were added specifically to deter and punish "egregious discrimination" and to reinforce the public policy against discrimination. 137 CONG. REC. H9526 (daily ed. Nov. 7, 1991).

123. *See supra* note 52 and accompanying text.

124. *See supra* notes 93–103 and accompanying text.

125. *See supra* notes 104–06 and accompanying text.

2. *A Punitive Damages Provision With Caps Strikes the Proper Balance*

The addition of a capped punitive damages provision serves to deter egregious violations of public policy without threatening employers' pecuniary interests. As part of the Model Act's compromise philosophy, employees cannot recover noneconomic damages, nor can they recover under the other tort actions commonly associated with wrongful discharge, such as defamation or intentional infliction of emotional distress.[126] This elimination of common law remedies under the Model Act will substantially reduce the potential employer liability for wrongful discharges, thus, the insertion of a limited punitive damages provision would not undermine the compromise. By adopting a punitive damages provision with a graduated cap similar to that found in the 1991 Civil Rights Act,[127] the goal of increased deterrence for egregious violations of public policy could be satisfied while at the same time protecting employers against large, devastating awards.

Although employers may argue that a punitive damages provision would undermine the compromise philosophy of the Act, a graduated cap would eliminate the extreme awards that employers fear most. This fear results from highly publicized and costly verdicts. In fact, such verdicts often precede wrongful termination legislation.[128] For example, in California, a verdict for $20 million led to a legislative proposal requiring just dismissals.[129] Although reports of high awards invoke employers' fears, they can be quite deceptive. According to a 1988 study by the Rand Corporation,[130] which evaluated 120 wrongful discharge verdicts, the ten largest awards accounted for 75% of the total dollars awarded in all 120 trials.[131] In addition, the Rand study

126. Independent tort actions can only be maintained if there are facts separate from the termination that support the cause of action. MODEL ACT, *supra* note 9, § 2(c) cmts.

127. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The 1991 amendments to the Civil Rights Act provide for both compensatory and punitive damages. The combined total of punitive and compensatory damages are capped according to a graduated scale. For instance, an employer who employs 20 workers may only be held liable for a maximum of $50,000 in damages, whereas, an employer with 200 workers may be held liable for up to $200,000. *Id.* § 102(b).

128. Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644, 650 (1991). Even the drafters of the Model Act point to multimillion dollar verdicts and other high awards as evidence that a legislative scheme is warranted. MODEL ACT, *supra* note 9, prefatory note, at 23.

129. Krueger, *supra* note 128, at 650.

130. DERTOUZOS, *see supra* note 53, at 26.

131. *Id.* Half of all awards were less than $177,000. *Id.*

found that punitive damages were only awarded in one third of the wrongful termination cases.[132]

These statistics indicate than an outright abolition of all punitive damage awards is unnecessary. Instead, state legislatures can prevent crippling awards by instituting a scheme based on caps that are more closely related to the average rate of punitive damages. A legislative cap on damages would be beneficial for two reasons. First, capping punitive damage awards has the advantage of not chilling legitimate business decisions. Without caps, the fear of high punitive damages could prevent an employer from firing an employee even when good cause exists. Second, a graduated punitive damages scheme protects smaller employers who may often be less sophisticated and more likely to "commit legal mistakes."[133] If smaller employers were liable for the same amount of punitive damages as their larger counterparts, the costs could be devastating. A cap is necessary to protect both businesses and the workers they employ. Conversely, in order to make an impact on wealthy employers, the penalty imposed must be greater. By including a punitive damages provision with a graduated cap, deterrence of egregious violations of public policy can be achieved at all levels without undermining employer interests in containing costs.

3. *Limiting Waiver Agreements Ensures Effective Deterrence*

The Model Act must strictly limit the use of waiver agreements in order to prevent employment terminations in violation of public policy. Although employers have a compelling interest in exempting top management personnel, whose positions require high levels of trust, cooperation, and accountability, the legitimacy of those interests decreases at lower levels in the administrative hierarchy. The Model Act, however, fails to specifically delineate the type of employees who can be opted-out of the good cause coverage. Consequently, an employer may exclude as many employees as it desires through waiver agreements including a large percentage of management-level personnel who are the most likely to be dicharged for refusing to commit an unlawful act or whistleblowing.[134] Restricting waiver agreements to a small percentage of key personnel designated by the employer[135]

132. *Id.*

133. Mallor, *supra* note 16, at 492.

134. *See supra* notes 113–14 and accompanying text.

135. Clyde Summers, *Employer Coverage and Employee Eligibility, in* PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE 83 (Jack Stieber & John Blackburn eds., 1983). Summers proposes that employers designate a percentage of employees (ranging from one to five percent) for exclusion under a wrongful discharge statute. Other commentators

would provide a better solution for three reasons. First, employers can retain greater control over employment decisions pertaining to crucial personnel. Second, high-ranking employees designated as key personnel by an employer likely possess the greatest bargaining power and may independently contract for job security. Third, the integrity of a punitive damages provision is maintained because the class of employees most likely to be terminated for egregious reasons, middle-management, will not be opted-out of the Model Act's protections. Without this limitation on the use of waiver agreements, the effectiveness of a punitive damages provision could be substantially reduced for a large class of employees traditionally vulnerable to termination in violation of public policy.

IV. CONCLUSION

The Model Act, if enacted, represents a significant departure from the law of wrongful discharge developed by state courts. Not only does the Model Act impose a uniform good cause standard on employee terminations, but the remedies available for wrongful terminations are limited to reinstatement, back pay, attorney fees, and severance pay when reinstatement is infeasible. Under common law, most states permit tort recovery for public policy violations; however, the Model Act's compromise philosophy has eliminated the potential for high awards against employers without instituting a specific deterrent mechanism. Both reinstatement and severance pay are inadequate substitutes for an explicit punitive damages provision. By employing a graduated scale for capping punitive damage awards, deterrence can be achieved without sacrificing employers' interests in reduced liability. In conjunction with a punitive damages amendment, state legislatures should revise the waiver agreements provision of the Model Act so that only key personnel can be excluded from the good cause protections. This limitation prevents waiver agreements from undermining the efficacy of a punitive damages provision by excluding middle-management employees who are the most likely victims of egregious terminations in violation of public policy.

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have proposed excluding employees entitled to a pension above a certain amount. *See, e.g.*, Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 72 (1988).